IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HORACE BARNES,	)	
	)	
Plaintiff,	)	**CIVIL ACTION**
	)	
v.	)	
	)	**No. 01-3202-KHV**
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

Horace Barnes, an inmate at the United States Penitentiary in Leavenworth, Kansas (USP-Leavenworth), brings suit under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, alleging malpractice by prison medical staff. This matter is before the Court on Defendant's Motion To Dismiss Or, Alternatively, Motion For Summary Judgment (Doc. #19) filed September 24, 2002 and plaintiff's Motion For Clarification Of Court's Orders (Doc. #75) filed July 16, 2004. For reasons stated below, the Court sustains defendant's motion and overrules plaintiff's motion.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. Applied Genetics, 912 F.2d at 1241.

"[W]e must view the record in a light most favorable to the parties opposing the motion for summary judgment." Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

The Court affords a *pro se* plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers, *pro se* litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Green v.

Dorrell, 969 F.2d 915, 917 (10th Cir. 1992), cert. denied, 507 U.S. 940 (1993). The Court may not assume the role of advocate for a *pro se* litigant. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Factual Background

For purposes of defendant's motion for summary judgment, the following facts are uncontroverted, deemed admitted or, where disputed, viewed in the light most favorable to plaintiff.[1]

Between August 15, 1997 and May 21, 1998, plaintiff was treated at USP-Leavenworth approximately 15 times for a rash and skin irritation on his penis. On December 28, 1998, plaintiff complained of skin irritation on his inner thigh, scrotum and penis. H. Al-Ruballe, a physician assistant, diagnosed plaintiff with jock itch and prescribed Tolnaftate. On January 27, 1999, plaintiff complained of a penis infection. Al-Ruballe diagnosed plaintiff with condylomata acuminata (genital warts) and treated him with medication from an unlabeled bottle. See Plaintiff's Objection To Defendant's Memorandum In Support Of Defendant's Motion To Dismiss Or Alternatively, Motion For Summary Judgment (Doc. #27) filed October 28, 2002 at 28.[2] Al-Ruballe stated that the bottle contained the prescription drug Podofilox.

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[1] Because plaintiff's complaint is sworn under penalty of perjury, the Court treats it as an affidavit in considering defendant's motion for summary judgment. See Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997).

Defendant has presented evidence of plaintiff's criminal background. Likewise, plaintiff has presented evidence of previous allegations and lawsuits related to two of the medical doctors on the staff at USP-Leavenworth. Both categories of evidence are irrelevant and the Court excludes them.

[2] The statements in plaintiff's opposition memorandum (Doc. #27) are not sworn under penalty of perjury. Accordingly, the Court must exclude them. See D. Kan. Rule 56.1(d) (all facts on which opposition is based shall be presented by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions). In an effort to understand plaintiff's claims, however, the Court has set forth plaintiff's (continued...)

See id. The next day, on January 28, 1999, plaintiff complained of swelling and soreness in the affected area. Al-Ruballe examined plaintiff that day and discontinued the Podofilox. Al-Ruballe and Phillip Hill, M.D. (the clinical director at USP-Leavenworth) prescribed Sulfameth/Trimeth and Clotrimazole. Plaintiff's adverse reaction "quickly resolved itself because he was never again given a Podojilox [sic] treatment from an unlabelled bottle." Id. at 28.

On March 17 and 23, 1999, D. Navarro, a physician assistant, examined plaintiff for genital warts but only recommended observation. On March 24, 1999, Dr. Hill noted that plaintiff had multiple depigmented areas on his penis which were likely a residual of a viral infection. Dr. Hill concluded that the infection was inactive but that if the lesions became raised, cryotherapy would be warranted. Plaintiff did not seek further treatment on his penis until June 13, 2000 when Judith Tharp, M.D. diagnosed him with genital warts and referred him to a dermatologist.

On May 22, 2000, plaintiff filed an administrative tort claim with the Bureau of Prisons. See Exhibit A-2 to Defendant's Memorandum (Doc. #20). Plaintiff alleged that on January 27, 1999, Al-Ruballe improperly treated his condition by prescribing Podofilox and that as a result, he had painful swelling and burning under his scrotum the next day.[3] See id. Plaintiff alleged that on January 28, 1999,

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[2](...continued)
unverified statements. Even if the Court granted plaintiff leave to properly verify his statements, the Court would reach the same result on defendant's motion to dismiss or for summary judgment.

[3] Plaintiff alleges that Al-Ruballe treated him on January 26, 1999, but the medical records reflect that he was not treated until January 27, 1999. In any event, the specific date of treatment is not material to defendant's motion.

Al-Ruballe and Dr. Hill prescribed Sulfameth/Trimeth and Clotrimazole.[4] See id. Plaintiff also alleged that Dr. Hill and Karen Todd, a physician assistant, provided false information during the inmate grievance procedure. See id. Plaintiff sought $100,000.00 in damages. See id.

On October 19, 2000, the Bureau of Prisons denied plaintiff's claim. On October 20, 2000, the Bureau of Prisons mailed plaintiff a notification of final denial and informed him that he had six months after the mailing to file suit in federal court. See Exhibit A-3 to Defendant's Memorandum (Doc. #20).

On April 19, 2001, plaintiff mailed a letter and complaint to the Clerk of this Court. The Clerk's Office received plaintiff's complaint on April 23, 2001. Plaintiff's letter instructed the Clerk's Office to file his complaint, but to wait for a United States Treasury check in the amount of $150.00. See Exhibit C to Defendant's Memorandum (Doc. #20). On April 23, 2001, the Clerk's Office notified plaintiff that his complaint could not be filed because he had not submitted the filing fee of $150.00 or a signed and authorized motion for leave to proceed in forma pauperis. See Exhibit D to Defendant's Memorandum (Doc. #20). On May 7, 2001, plaintiff sent another letter to the Clerk's Office as follows:

> Please wait on the check from the Treasury Department. On May 4, 2001, the money was taken off my inmate account. Enclosed is a copy of the computer print-out. This process takes approximately 1-2 weeks. The check is in the amount of $150.00 for the filing fee [for] my civil rights complaint.

Exhibit E to Defendant's Memorandum (Doc. #20). The Clerk's Office received the filing fee and filed plaintiff's complaint on May 21, 2001. See Exhibit F to Defendant's Memorandum (Doc. #20).

In his complaint, plaintiff alleges that (1) during several examinations from 1997 through 1999, the

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[4] Plaintiff alleges that Al-Ruballe and Dr. Hill prescribed the medication on January 27, 1999, but the medical records reflect that they did not prescribe the medication until January 28, 1999. Again, the specific date is not material.

medical staff negligently diagnosed him with condylomata acuminata; (2) on several occasions from 1997 through 1999, medical staff negligently prescribed anti-itching and foot creams to treat plaintiff's condition; (3) on January 27, 1999, Al-Ruballe negligently treated plaintiff with medication from an unlabeled bottle; and (4) on January 28, 1999, Al-Ruballe and Dr. Hill negligently prescribed Clotrimazole.

Plaintiff's complaint named seven individual defendants and sought damages under Bivens v. Six Unknown Named Agents of Fed. Bur. of Naroctics, 403 U.S. 388 (1971), and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2675. On July 19, 1999, the Honorable G. T. VanBebber dismissed the Bivens claim because plaintiff alleged only that defendants negligently provided medical care. See Order (Doc. #5) at 1-2. Judge VanBebber noted that plaintiff had exhausted his administrative remedies on his FTCA claim, but that the United States of America would be substituted as the sole defendant. See id. at 2.

Defendant seeks dismissal or summary judgment on plaintiff's claims. It argues that (1) plaintiff's FTCA claim is barred because he did not file his complaint within six months after the Bureau of Prisons denied his administrative tort claim, (2) except for his allegations that medical staff provided negligent care between January 26 and January 28, 1999, plaintiff has not exhausted his administrative remedies by filing an administrative tort claim, (3) plaintiff's request for relief in his complaint should be limited to the amount requested in his administrative claim and (4) plaintiff has not provided sufficient evidence for a reasonable jury to find in his favor on his FTCA claim.

Analysis

I. Statute Of Limitations

Defendant asserts that the statute of limitations bars plaintiff's FTCA claim. The FTCA provides

that a "tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). Because Section 2401(b) constitutes a waiver of the sovereign immunity of the United States, the Court must strictly construe it in order to prevent expanding the waiver beyond what Congress intended. Pipkin v. United States Postal Serv., 951 F.2d 272, 275 (10th Cir. 1991); United States v. Kubrick, 444 U.S. 111, 117-18 (1979). In addition, as a waiver of sovereign immunity, the statute of limitations is jurisdictional in nature so that if the action is barred, the Court lacks subject matter jurisdiction over plaintiff's claim. See Bradley v. United States, 951 F.2d 268, 270 (10th Cir.1991).

The Bureau of Prisons mailed its final denial letter on October 20, 2000. Plaintiff initially argues that because the letter was sent by mail, he is entitled to an additional three days to file suit under Rule 6(e), Fed. R. Civ. P. Because the six-month period runs from "the date of mailing" and not the date of service, however, Rule 6(e) does not allow an additional three days. 28 U.S.C. § 2401(b); see Hatchell v. United States, 776 F.2d 244 (9th Cir. 1985) (Rule 6(e) does not permit additional three days to six-month period in FTCA); Carr v. Veterans Admin., 522 F.2d 1355 (5th Cir. 1975) (six-month period commences on date of mailing, not date of plaintiff's receipt).

Plaintiff mailed his complaint on April 19, 2001, but the Clerk's Office did not receive it until April 23, 2001 – three days after expiration of the six-month period. As an inmate, however, plaintiff is entitled to the benefit of the prison mailbox rule. See Sulik v. Taney County, Mo., 316 F.3d 813, 815 (8th Cir. 2003) (extending prison mailbox rule to Section 1983 complaints); Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002) (habeas corpus petition should be deemed filed when petition is handed over to prison

authorities for mailing); Tapia-Ortiz v. Doe, 171 F.3d 150, 152 (2d Cir. 1999) (applying mailbox rule to FTCA claim mailed from prison before statute of limitations had run); Ortiz v. Cornetta, 867 F.2d 146, 148-49 (2d Cir. 1989) (applying prison mailbox rule to filing of Section 1983 complaint for statute of limitation purposes); see also Houston v. Lack, 487 U.S. 266, 276 (1988) (notice of appeal deemed filed when delivered to prison officials for mailing); Dunn v. White, 880 F.2d 1188, 1190 (10th Cir. 1989) (applying mailbox rule to objections filed to magistrate's report); Jones v. United States, No. 01-3094-GTV, 2004 WL 385459, at *4 (D. Kan. Feb. 26, 2004) (applying prison mailbox rule to FTCA complaint).[5]

Although plaintiff mailed his complaint before expiration of the six-month period, he did not tender the filing fee at the time he submitted his complaint. Accordingly, the Clerk's Office did not actually file his complaint until he paid the filing fee on May 21, 2001, some 31 days after the six-month period had expired.[6] Although the deadlines in Section 2401(b) are jurisdictional, courts apply the doctrine of

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[5] Plaintiff has not presented an affidavit which states that he mailed his complaint on April 19, 2001 (the date on his complaint and the enclosure), but the Court can assume that he did so on April 19 or 20, 2001 because the Court received it on Monday, April 23, 2001. See Beaudry v. Corrs. Corp. of Am., 331 F.3d 1164, 1165 n.1 (10th Cir. 2003) (because date on face of notice of appeal raises inference that plaintiffs relinquished control over document on that date, appeal considered timely filed); United States v. Adkins, 47 Fed. Appx. 534, 536 (10th Cir. 2002) (assuming that prisoner presented notice of appeal to prison officials for mailing at least one day before court received it); Jones, 2004 WL 385439, at *4 (same).

[6] The Tenth Circuit has held that the District of Kansas can properly require payment of the filing fee before formally "filing" a complaint. See Jarrett v. US Sprint Communications Co., 22 F.3d 256, 259 (10th Cir.), cert. denied, 513 U.S. 951 (1994). Jarrett held that the statute of limitations for a Title VII claim is tolled while a petition to proceed *in forma pauperis* ("IFP") is pending. See id. Jarrett further recognized that in the case of a denial of an IFP petition, extenuating facts might warrant a brief additional extension of the deadline to pay the filing fee. See id. at 260. Courts must review such facts on a case-by-case basis. See id.

equitable tolling to FTCA claims against the government. See Motley v. United States, 295 F.3d 820, 824 (8th Cir. 2002); Perez v. United States, 167 F.3d 913, 919 (5th Cir. 1999); Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997); Glarner v. United States, 30 F.3d 697, 701 (6th Cir. 1994); see also Irwin v. Veterans Admin., 498 U.S. 89, 95-96 (1990) (equitable tolling doctrine may be applied to federal claims); Pipkin, 951 F.2d at 275 (equitable considerations may permit extension of time limits on federal claims). But see Wukawitz v. United States, 170 F. Supp.2d 1165, 1168-70 (D. Utah 2001) (equitable tolling doctrine does not apply to FTCA cases); Laroque v. United States, 750 F. Supp. 181, 184 (E.D.N.C. 1989) (compliance with FTCA statute of limitations is jurisdictional predicate which cannot be tolled). Equitable tolling is only available, however, when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control. Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000), cert. denied, 531 U.S. 1194 (2001); see Irwin, 498 U.S. at 96, 111 S. Ct. 453, 458 (equitable tolling on federal claims does not extend to "garden variety claim of excusable neglect"). Plaintiff bears the burden of demonstrating that equitable tolling applies. See Olson v. Fed. Mine Safety & Health Review Comm'n, --- F.3d ----, 2004 WL 1880141, at *6 (10th Cir. Aug. 24, 2004); Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 525 U.S. 891 (1998).

Liberally construing plaintiff's memoranda, he argues that the deadline should be tolled because he was delayed by prison procedures for obtaining a check. To his credit, plaintiff timely mailed his complaint to the Clerk's Office and advised that he would submit a check for the filing fee. Approximately two weeks later, he advised the Clerk's Office that the process of obtaining a check could take an additional one or two weeks. On the other hand, plaintiff apparently did not request a check from prison officials until some

15 days after he mailed his complaint. Plaintiff does not claim that at the last minute he learned about the administrative delay in obtaining a check or that any extraordinary circumstances prevented him from obtaining the check before he mailed his complaint. Although plaintiff could have submitted an IFP application which would have tolled the filing fee deadline, see Jarrett, 22 F.3d at 259, he chose to pay the entire filing fee. Plaintiff should not be penalized for choosing to pay the full filing fee (albeit one month late) rather than submit an IFP application. In addition, numerous courts have held in various contexts that submission of a complaint for filing without the required filing fee or IFP application constitutes "filing" for purposes of the statute of limitations.[7] For these reasons, the Court finds that the six-month deadline for plaintiff to file his FTCA claim was equitably tolled until May 21, 2001, the date that he submitted the filing fee and the Clerk's Office filed his complaint.[8] The Court therefore overrules defendant's motion to dismiss on this issue.

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[7] See Casanova v. Dubois, 304 F.3d 75, 80 (1st Cir. 2002) (civil rights action); McDowell v. Del. State Police, 88 F.3d 188, 191 (3d Cir. 1996) (same); Robinson v. Doe, 272 F.3d 921, 922-23 (7th Cir. 2001) (same), cert. denied, 535 U.S. 1084 (2002); Jones v. Bertrand, 171 F.3d 499, 502 (7th Cir. 1999) (habeas petition); Cintron v. Union Pac. R.R. Co., 813 F.2d 917, 920-21 (9th Cir. 1987) (FELA); Rodgers v. Bowen, 790 F.2d 1550, 1551-52 (11th Cir. 1986) (social security appeal); Wrenn v. Am. Cast Iron Pipe Co., 575 F.2d 544, 547 (5th Cir. 1978) (Title VII); Molina v. City of Lancaster, 159 F. Supp.2d 813, 819 (E.D. Pa. 2001) (civil rights action); Wells v. Apfel, 103 F. Supp.2d 893, 897-99 (W.D. Va. 2000) (social security appeal); see also Parissi v. Telechron, Inc., 349 U.S. 46, 47 (1955) (notice of appeal); Gould v. Members of N.J. Div. of Water Policy & Supply, 555 F.2d 340, 341 (3d Cir. 1977) (same).

[8] The Ninth Circuit has applied equitable tolling in similar, but more compelling, circumstances. See Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). In Miles, *five days before expiration of the statute of limitations*, plaintiff submitted to prison staff his complaint and request for a check for the filing fee. Plaintiff asked prison officials to mail the complaint and check directly to the district court. Prison officials delayed in complying with plaintiff's instructions and once the check had finally been issued, they returned both the check and petition directly to plaintiff, rather than mailing these materials to the district court as plaintiff had instructed. Plaintiff ultimately filed his habeas petition some 40 days after expiration of the statute of limitations, but the Ninth Circuit held that the petition was timely.

II. Exhaustion Of Administrative Remedies

Defendant argues that except for his allegations that medical staff provided negligent care between January 26 and January 28, 1999, plaintiff has not exhausted administrative remedies. Plaintiff argues that Judge VanBebber has already held that he exhausted administrative remedies. See Plaintiff's Objection (Doc. #27) at 23.

Before defendant was served with the summons and complaint, on an initial review of the complaint, Judge VanBebber held that plaintiff had exhausted his administrative remedies under the FTCA and that a responsive pleading was required on that claim. See Order (Doc. #5) filed July 19, 2001 at 2. Accordingly, Judge VanBebber ordered that defendant be served with the summons and complaint. Judge VanBebber's ruling on administrative remedies was based on plaintiff's complaint and attachments which included the final denial letter from the Bureau of Prisons on October 20, 2000. Judge VanBebber did not address the scope of plaintiff's FTCA claim and his ruling does not preclude defendant from raising the issue on a motion to dismiss.

As a jurisdictional prerequisite, the FTCA bars claimants from bringing suit in federal court until they have exhausted administrative remedies. See 28 U.S.C. § 2675(a); McNeil v. United States, 508 U.S. 106, 113 (1993); Duplan v. Harper, 188 F.3d 1195, 1199 (10th Cir. 1999); Pipkin, 951 F.2d at 273. In order to comply with Section 2675(a), claimants must file an administrative claim which contains "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir. 1992) (citations omitted). The requirements are jurisdictional and cannot be waived. See id. Furthermore, because the FTCA constitutes a waiver of the government's sovereign immunity, the Court must strictly

construe its notice requirements. See id.

Here, the Court must determine whether the allegations in plaintiff's administrative claim encompass his civil claims in this case. In his administrative claim, plaintiff had the burden of pleading the pertinent facts. Palay v. United States, 349 F.3d 418, 425 (7th Cir. 2003). All that is required, however, is "sufficient notice to enable the agency to investigate the claim." Id. (quotations and citations omitted). Any cause of action fairly implicit in the facts that plaintiff set forth will be considered a claim that was presented to the Bureau of Prisons for purposes of the exhaustion requirement. Id. (quotations and citations omitted).

Plaintiff's administrative claim is clearly limited to his treatment between January 26 through January 28, 1999. See Exhibit A-2 to Defendant's Memorandum (Doc. #20). Although plaintiff's complaint here refers generally to treatment during 1997 and 1998, the Court will construe such factual allegations as background assertions in support of plaintiff's malpractice claim for treatment between January 26 through 28, 1999. See, e.g., Civil Rights Complaint (Doc. #1) at 5 (in previous year, Al-Ruballe treated rash with Tolnaftate, Clotrimazole and Hydrocortisone Cream; Al-Ruballe was aware of the disease since 1997); id. at 6 (in 1997 and 1998, Dr. Hill prescribed Hyoroxyzine, Clotrimazole, Indomethacin, Hydrochlorothiazide, Tolnaftate and Sulfameth/Trimeth). Because the administrative claim does not plead facts relating to treatment outside the three-day period of January 26 through 28, 1999, plaintiff cannot assert a malpractice claim which is any greater in scope. The Court therefore sustains in part defendant's motion to dismiss on this issue.

III. Amount Of Plaintiff's Claim

In his FTCA claim presented to the Bureau of Prisons, plaintiff sought $100,000.00 in damages. In his complaint, plaintiff seeks $4,000,000.00 in damages. Defendant argues that plaintiff's request for

relief should be limited to the amount requested in his administrative claim.

Plaintiff cannot maintain an action under the FTCA for any sum in excess of the amount of the claim presented to the agency unless the increased amount is based (1) upon "newly discovered evidence" not reasonably discoverable at the time of presenting the claim to the federal agency or (2) upon proof of intervening events, relating to the amount of the claim. 28 U.S.C. § 2675(b).

Plaintiff argues that the increase of damages from $100,000.00 to $4,000,000.00 is based on the newly discovered fact that Mycelex (1% Clotrimazole) is not to be used on the penis. Plaintiff has not shown that this fact was not reasonably discoverable at the time of his administrative claim. More importantly, this fact relates to whether prison medical staff breached their duty of care to plaintiff, not to the nature or extent of plaintiff's damages. Therefore plaintiff's claim for damages in this case is limited to $100,000.00.

IV. Motion For Summary Judgment

Plaintiff alleges only two claims on which he exhausted administrative remedies: (1) on January 27, 1999, Al-Ruballe negligently treated him with medication from an unlabeled bottle which Al-Ruballe stated was the prescription drug Podofilox; and (2) on January 28, 1999, Al-Ruballe and Dr. Hill negligently prescribed Clotrimazole for his condition.[9] Defendant argues that it is entitled to summary judgment because plaintiff has not produced evidence of (1) the standard of care, (2) any breach of the standard of

[9] Plaintiff claims that he did not have condylomata acuminata, but the only evidence he cites is the report of a dermatologist (name illegible) on October 13, 2000. See Plaintiff's Objection (Doc. #27) at 8. The dermatologist did not opine as to what medical conditions plaintiff had in January of 1999. See Exhibit 14 to Plaintiff's Objection (Doc. #27).

care or (3) injuries resulting from any such breach.[10]

Under the FTCA, the United States is liable "for injury . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); 28 U.S.C. § 2674. Here, the relevant conduct occurred in Kansas, so Kansas law applies. To establish a claim for medical malpractice in Kansas, plaintiff must demonstrate that defendant owed him a duty, defendant breached the duty and a causal nexus exists between plaintiff's injury and the duty breached. Sharples v. Roberts, 249 Kan. 286, 816 P.2d 390, 397 (Kan. 1991); Kernke v. Menninger Clinic, Inc., 172 F. Supp.2d 1347, 1352-53 (D. Kan. 2001). "Under Kansas law, a physician has a duty to use reasonable and ordinary care and diligence in the diagnosis and treatment of his or her patients, to use his or her best judgment, and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other physicians in the same or similar locations under like circumstances." Rios v. Bigler, 847 F. Supp. 1538, 1542 (D. Kan. 1994) (citation omitted). "Except where the lack of reasonable care or the existence of proximate cause is apparent to the average layman from common knowledge or experience, expert testimony is required in medical malpractice cases to establish the accepted standard of care and to prove causation." Bacon v. Mercy Hosp. of Ft. Scott, Kan., 243 Kan. 303, 307, 756 P.2d 416, 420 (Kan. 1988) (citations omitted).

A. Prescription On January 27, 1999 From An Unlabeled Bottle

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[10] Defendant also argues that plaintiff has failed to state a claim for malpractice. Because the Court finds below that defendant is entitled to summary judgment, the Court need not address defendant's alternative argument.

In his opposition memorandum, plaintiff states that on January 27, 1999, Al-Ruballe treated him with medication from an unlabeled bottle and that Al-Ruballe stated that the bottle contained the prescription drug Podofilox. See Plaintiff's Objection (Doc. #27) at 13, 28.[11] Defendant argues that it is entitled to summary judgment because plaintiff has not offered expert testimony to show that Al-Ruballe breached the standard of care or that plaintiff suffered injury because of that breach. Plaintiff's unsworn statement is insufficient to withstand a motion for summary judgment. See D. Kan. Rule 56.1; Fed. R. Civ. P. 56(e).

If plaintiff's statement was verified, a reasonable jury might conclude that Al-Ruballe breached the standard of care by giving plaintiff an unlabeled bottle of a prescription drug. See Bacon, 243 Kan. at 307, 756 P.2d at 420 (lack of reasonable care can be established by common knowledge or experience). Even if plaintiff could establish a breach of the standard of care, however, he has not presented evidence that he suffered injury on account of that breach. In his opposition memorandum, plaintiff states that he had received Podofilox treatments with no adverse reaction in the past, but that when he received the treatment from the unlabeled bottle on January 27, 1999, he suffered swelling and pain. See Plaintiff's Objection (Doc. #27) at 28. Again, plaintiff's statement is unverified. Assuming that plaintiff could submit a verified statement on this issue, a reasonable jury could conclude that plaintiff suffered some injury from taking the substance in the unlabeled bottle. Absent speculation, however, the jury could not conclude that the lack of labeling caused plaintiff's injuries. In other words, plaintiff has not shown what was in the bottle or that it was something other than Podofilox – what Al-Ruballe intended to use and what plaintiff had received

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[11] In his complaint, plaintiff alleged that Al-Ruballe told him that the medication was "Tetracylene." Civil Rights Complaint (Doc. #1) at 6.

in the past with no adverse reaction. No reasonable jury could find that plaintiff was injured because the bottle was not labeled. The Court therefore sustains defendant's motion for summary judgment on this claim.

B. Prescription On January 28, 1999 Of Clotrimazole

With regard to the claim for treatment on January 28, 1999, plaintiff has presented a letter from Bayer Corporation which states that "Myclex 1% (Clotrimazole)" is not indicated for the treatment of condylomata (genital warts). See Exhibit 7 to Plaintiff's Objection (Doc. #27). Plaintiff has also presented a similar statement from the Food and Drug Administration. See Exhibit C to Motion For Leave To Supplement Plaintiff's Objection To Defendant's Motion To Dismiss, Or Alternatively Summary Judgment (Doc. #31) filed November 15, 2002. Although the statements are not properly authenticated, plaintiff could likely obtain such authentication before trial. Accordingly, a reasonably jury could find that Al-Ruballe and Dr. Hill breached the standard of care by prescribing Clotrimazole for treatment of condylomata. See Bacon, 243 Kan. at 307, 756 P.2d at 420. On the issue of causation, however, plaintiff has presented no evidence that the Clotrimazole prescription caused any injuries.

Plaintiff states that from 1997 through at least April of 2001, he has suffered from various rashes, skin irritations and genital warts. See Civil Rights Complaint (Doc. #1) at 5 (rash on penis because of uncontrollable disease since at least 1997); id. (Dr. Hill prescribed various medications from 1997 through 1999); id. at 6 (disease still affects plaintiff as of April 19, 2001); Plaintiff's Objection (Doc. #27) at 5-11, 25-32 (describing continued symptoms and inadequate treatment from 1997 through 2000). Absent expert testimony, plaintiff cannot show that the prescription of Clotrimazole on January 28, 1999 caused any of his injuries. See Bacon, 243 Kan. at 307, 756 P.2d at 420. Accordingly, the Court sustains defendant's

motion for summary judgment on this claim.

V. Plaintiff's Motion For Clarification Of Court Order

Plaintiff seeks clarification of an order of July 9, 2004 by Judge VanBebber which overruled three motions.[12] Plaintiff asks for a copy of the Order of July 9, but the order was in summary form and was included only as a docket entry. To the extent plaintiff seeks reconsideration, he has not alleged sufficient grounds for the Court to reconsider the order of July 9 at this time. See D. Kan. Rule 7.3(b) (motion to reconsider shall be based on intervening change in controlling law, availability of new evidence, or need to correct clear error or prevent manifest injustice). In particular, plaintiff has not alleged that the evidence allegedly intercepted by the warden or the evidence regarding a separate malpractice claim against Dr. Hill is relevant to his claims in this action.

IT IS THEREFORE ORDERED that Defendant's Motion To Dismiss Or, Alternatively, Motion For Summary Judgment (Doc. #19) filed September 24, 2002 be and hereby is **SUSTAINED**. Plaintiff failed to exhaust his administrative remedies except as to the following two claims: (1) on January 27, 1999, Al-Ruballe negligently treated him with medication from an unlabeled bottle and (2) on January 28, 1999,

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[12] On November 4, 2003, plaintiff filed a renewed motion for a temporary restraining order. See Renewed Application For Restraining Order (Doc. #68). Under Bivens v. Six Unknown Named Agents of Fed. Bur. of Naroctics, 403 U.S. 388 (1971), plaintiff sought to enjoin the warden of USP-Leavenworth from interfering with his legal mail based on incidents in May and June of 2003 related to a lawsuit before the Kansas Court of Appeals. See id. at 1-2. Plaintiff claimed that the mail which the warden intercepted in May and June of 2003 also related to this case. See id. at 3. On May 17, 2004, plaintiff filed a motion to supplement his pleadings to add certain Missouri statutes, rules and regulations under the Missouri Healing Arts Practice Act. See Motion For Amended And Supplemental Pleadings (Doc. #71). On June 18, 2004, plaintiff also filed a motion to supplement his pleadings to add information regarding a separate malpractice claim against Dr. Hill. See Motion For Amended And Supplemental Pleading (Doc. #72).

Al-Ruballe and Dr. Hill negligently prescribed Clotrimazole for his condition. As to these claims, defendant is entitled to summary judgment.

IT IS FURTHER ORDERED that plaintiff's Motion For Clarification Of Court's Orders (Doc. #75) filed July 16, 2004 be and hereby is **OVERRULED**.

Dated this 27th day of September, 2004, at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge